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In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No. 75-935

MANHATTAN CONSTRUCTION COMPANY, a Corporation,

Petitioner,

vs.

McDOWELL-PURCELL, INC., a Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RICHARD A. WAGNER, II
THORNTON, WAGNER & THORNTON
1111 Mid-Continent Building
Tulsa, Oklahoma 74103
918-587-2544

Attorneys for Petitioner

December 20, 1975

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TO THE HONORABLE CHIEF JUSTICE
AND ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES

Manhattan Construction Company, the Petitioner herein, prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on June 18, 1975. Said judgment was rendered on appeal of a judgment entered in said cause by the United States District Court for the Northern District of Alabama, Jasper Division, on March 20, 1974.

I

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, rendered on June 18, 1975, was ordered not published. It is printed in Appendix A hereto at page A1. The opinion of the United States District Court for the Northern District of Alabama, entered on March 20, 1974, has not been reported, officially or unofficially, and is printed in Appendix B hereto at page B1.

II

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was entered on June 18, 1975, in accordance with the Court's opinion filed the same date. Petitioner's Petition for Rehearing was denied on September 25, 1975.

The statutory provisions conferring on the Supreme Court jurisdiction to review the judgment in question by writ of Certiorari is 28 U.S.C., Sec. 1254(1). An Order staying the mandate to and including December 24, 1975, was issued on December 3, 1975, by the said Fifth Circuit pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure.

III

QUESTION PRESENTED FOR REVIEW

1. Does the Fifth Circuit's Opinion of June 18, 1975 (see p. A1) satisfy the required standards to be met by an appellate decision and disposition?

2. May a contractor recover for "extras", i.e. work done which is not within the express terms and provisions of his contract, where there is no written agreement for such extra work?

IV

CONSTITUTION OR STATUTES INVOLVED

This case involves no Federal or State constitutional provisions, statutes, or treaties.

V

STATEMENT OF THE CASE

The Petitioner, Manhattan Construction Company (Manhattan), the successor in interest to Manhattan Construction Company of Texas, the original defendant, is an Oklahoma corporation having its principal place of business in the City of Muskogee, State of Oklahoma. Manhattan is a general contractor engaged in all types of general construction business and operates generally throughout the southwestern and the southeastern United States. At some time prior to May of 1969, Manhattan Construction Company of Texas formed a joint venture with John S. Walton, Jr. and Norman J. Walton, a partnership doing business as J. S. Walton and Company of Mobile, Alabama. The joint venture was known as Manhattan-Walton. Manhattan was the only joint venturer named as a defendant. (Reference to Manhattan or to the Petitioner hereafter shall also be deemed to mean reference to the joint venture and to the joint venturers thereof whenever applicable.)

McDowell-Purcell, Inc., (McDowell), The Respondent, is a Tennessee corporation having its principal place of business in the City of Nashville, State of Tennessee, and is what could be

termed a multiple phase construction company, having divisions which engage in road construction, excavation work and foundation work, the latter work would include caisson and piling construction.

On May 9, 1969, Manhattan entered into a construction contract with Alabama Power Company ("APC"). This contract described the work required for the Substructure Construction of the Alabama Power Company's Gorgas Steam Plant - Unit No. 10, located at Gorgas, Alabama. Said contract contained the Specifications for such work. The Specifications divided the work into six major sections: Section I - General Specifications; Section II - Earth, Rock and Unwatering; Section III - Rock Supported Foundations for Power House; Section IV - Pipe Piling; Section V - Sheet Piling; and Section VI - Concrete.

On or about the same date as the general contract was executed by Manhattan and APC, Manhattan entered into a subcontract with McDowell-Purcell, Inc., the Respondent, which obligated McDowell to perform the caisson work under Section III of the Specifications, and the Hydraulic Lift Casing also under Section III of the Specifications. Only that Section III of the Specifications was applicable to and incorporated as part of the subcontract.

The site for the construction of the Substructure was adjacent to Unit No. 9 of the Gorgas Steam Plant. The size of the construction site was 220 x 290 feet. At the time the contract was executed, this site was under water. It was contemplated that this pond would be drained, and that after drainage the site would be excavated to a depth of approximately 15 to 18 feet below the level of the Warrior River which ran adjacent

to the construction site.

As soon as the excavation was completed to the desired level, Manhattan installed an unwatering system as required under Section II of the Specifications for the Substructure. At about this same time, McDowell moved its equipment in to commence the drilling of caissons. It was originally contemplated that McDowell would drill approximately 300 caissons but this number was decreased during the work at the direction of APC. These caissons varied in size and depth ranging from six to twenty feet in depth and three to ten feet in diameter. The drilling of the caissons commenced in the fall of 1969 and proceeded from West to East until completed in the spring of 1970. During the course of drilling the caissons and upon reaching the specified depth, McDowell encountered water. The water entered the caissons at the bottom. The amount of such water varied as each caisson was drilled, depending upon the length of time the caisson hole was left open. The water encountered was no more than seepage water and was no more than what would normally be encountered in drilling caissons of this type and in this area.

McDowell was required by the inspector of APC to make the holes dry. McDowell objected to this requirement, taking the position that it was not required to do so under its subcontract with Manhattan. McDowell did not keep records of the cost it allegedly incurred in making the first 80 holes dry as distinguished or as segregated from the cost that it incurred in drilling, seating, sealing and pouring concrete in the caissons that would normally be required by McDowell. The source of the water was from the subsurface strata of the earth. The water did not enter the caisson holes from the top since the lip of the caisson protruded above the level of the ground.

At about the time McDowell finished drilling and sealing the first 80 caissons there was a discussion between representatives of Manhattan and McDowell about the water in the caissons. Therein, McDowell allegedly threatened to move off the job unless some relief was granted to it for this alleged increased cost. It was decided that from that point on McDowell would keep a record of the costs that it would incur in drying up the balance of the caisson holes, and Manhattan would try to get a change order from APC for this "extra work".

Prior to the time that the decision was reached to keep a record of the costs, there had been continuous discussions between McDowell, Manhattan and APC concerning the water in the bottom of the caissons and these discussions related primarily to the obligation of McDowell to remove the water from the bottom of the caisson holes.

Manhattan attempted to have APC recognize the drying of the caisson holes as "an extra" but met without success. McDowell's claim for extra work was never reduced to writing as were other claims for work made by McDowell to Manhattan. For months after the job was completed McDowell continued to submit to Manhattan a statement in the amount of $21,291.44, which Manhattan refused to pay.

In September of 1972, McDowell filed its original complaint in this matter seeking recovery of $79,904.26 for work and labor performed by McDowell for Manhattan under the subcontract agreement previously referred to.

A day or two prior to a scheduled pre-trial conference in this matter McDowell filed an amendment to its complaint

wherein it sought recovery alternatively as follows:

(a) $21,291.44 due from Manhattan to McDowell by account on, to-wit , the 4th day of May, 1970; or

(b) $21,291.44 due from Manhattan to McDowell on account stated between Manhattan and McDowell on, to-wit, the 4th day of May, 1970; or

(c) $21,291.44 due from Manhattan to McDowell for work and labor done for Manhattan by McDowell between, to-wit, November 20, 1969 and, to-wit, May 4, 1970 at Manhattan's request; and

(d) $46,886.40 for work and labor done for Manhattan by McDowell between, to-wit, May 9, 1969 and, to-wit, November 14, 1969 at Manhattan's request; and

(e) $3,193.72 as a reasonable profit on the services which McDowell performed for Manhattan for the sum of $21,291.44 previously alleged; or

(f) $46,886.40 as damages for breach of a covenant entered into by McDowell on, to-wit, May 9, 1969; or

(g) $46,886.40 as unjust enrichment of Manhattan at the expense of McDowell.

The trial court considered sections I, II and III of the

specifications in reaching its decision (see p. B1 et seq.). The decision was composed of the $21,291.44 amount for the furnishing of labor and materials, the $3,193.72 amount as and for loss of profit, and the slightly decreased $40,000.00 amount for increased cost of construction of the first eighty (80) caissons, computed at a cost of $500.00 per caisson and not the $586.08 per caisson figure advanced by McDowell.

The record did not support the trial court's judgment. The record was absolutely void as to any circumstance or conversations, let alone any agreement to pay for the supposed $46,886.40 greater expense. The record showed that the conversation about keeping costs pertained to the balance of caisson holes and occurred after these holes were drilled and sealed.

There was no evidence that Manhattan agreed with McDowell that the amount of $21,291.44 was correct as the amount due and owing from Manhattan to McDowell. There was no evidence that Manhattan promised either expressly or impliedly to pay the amount of $21,291.44.

McDowell did not prove any costs incurred in sealing the caissons. McDowell presented expenses incurred by McDowell in furnishing material and drilling in the elevator pit and not for the sealing of caissons. Deducting this amount from McDowell's claim for $21,291.44 would have left a balance of $19,150.19, the amount expended by McDowell in partially sealing the last 108 (sic) caisson holes. $10,000.00 of the amount of $19,150.19 was for equipment used in the partial sealing of the last 108 (sic) holes. This equipment charge was for equipment which would have been on the job regardless of any partial sealing expense which McDowell incurred.

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McDowell, in preparing its bid for the job, included a daily equipment cost of $550.00 per day for 198 days. McDowell completed the job in less than 198 days.

McDowell did not keep cost records with respect to each individual caisson for the first 80 caissons drilled, even though it knew that it was incurring additional cost for the work required of it by the inspector of APC. To determine the difference in cost between the total sealing required of the first 80 holes and the partial sealing required for the last 108 (sic) holes, McDowell first divided the total cost of the first 80 holes by 80 to determine the cost per hole and then divided the total cost for the last 108 (sic) holes by 108 (sic) to determine the cost of each of the 108 (sic) holes. It then subtracted from the per-caisson cost of the first 80 holes the per-caisson cost for the last 108 (sic) holes to determine the difference in cost between the two, this difference being $586.08 per caisson. It then multiplied this number by 80 to obtain $46,886.40 - the difference in cost of the first 80 holes and the last 108 (sic) holes. It did not break this figure down to determine what amount thereof was attributable to equipment and what amount was attributable to labor and material. Using the same ratio of equipment cost to the total amount claimed as was used in the $19,150.19, it would show that 56 per cent of such amount was attributable to equipment cost and, thus, of the $46,886.40 claim, the equipment cost would amount to approximately $24,340.93. This was for equipment which would have been on the job irrespective of whether or not McDowell was required to partially seal the last 108 (sic) holes. In preparing its estimate, McDowell used a daily equipment cost of $550.00. McDowell estimated 198 days as the number of days required to complete its work, whereas, in fact, McDowell completed its work in a substantially lesser number of days.

Manhattan did not fail to perform its contract with APC. McDowell was not requested by Manhattan to perform Manhattan's contract with APC. It was directed to remove the water from the caisson holes by the purchaser's Inspector, i.e., APC. Manhattan was not unjustly enriched at the expense of McDowell.

The only business relationship existing between McDowell and Manhattan at all times material to this action was the subcontract which the parties executed for the work to be performed by McDowell for Manhattan.

Manhattan appealed the judgment to the United States Court of Appeals for the Fifth Circuit, which, after determining that the said appeal was so frivolous as not to deserve summary treatment under its local rules, allowed submission of briefs and oral argument but affirmed said judgment in a summary Opinion of June 11, 1975 (see p. A1 et seq.).

In its Opinion, the Fifth Circuit failed to read the contract documents accurately. Manhattan's obligations with respect to water were set out in the contract. Section I, General (applies to all subsequent sections of the contract whether the work was done by Manhattan or whether Manhattan subcontracted the work), stated:

> "Removal of ground water and surface water as required to keep the excavations sufficiently dry to allow construction to progress as scheduled." (emphasis added).

The term "as required" referred to requirements set forth in Section II (Manhattan's work) and Section III (McDowell-

Purcell's work) for the removal of ground water and surface water. The plural of "excavation" was used because there was an excavation site and there were caisson excavations. There was surface water in the excavation site, e.g. a pond had to be drained; and there was ground water, e.g. artesian water and water from the sides of the excavation.

Section II, Earthwork, Rockwork and Unwatering, required Manhattan to remove surface and ground water:

> "Scope
>
> The contractor shall perform the items of work specified below:
>
> . . . . . .
>
> Removal of surface and ground water, and keeping working areas sufficiently dry to allow construction to progress as scheduled.
>
> Unwatering of Ground Water
>
> In order to perform the excavation for the power house, the water passages, intake-discharge structure and chimney foundation, the removal of ground water will be required.
>
> . . . . . .
>
> The Contractor will be responsible for pumping out the existing pond .....
>
> . . . . . .
>
> Surface Drainage
>
> The Contractor shall be responsible for sur-

face drainage water .... Cuts and fills shall be made...to allow water to run off without pounding. All temporary drainage facilities for surface water shall be furnished by the Contractor...."

. . . . . .

Section III, Rock Supported Foundations for Power House, required McDowell-Purcell to seal the caissons so as to prevent seepage of water and to make the caisson excavation clean and free of any foreign matter and water.

With these clear and succinct portions of the contract before it, the Fifth Circuit in its Opinion of June 18, 1975 stated:

"Under the agreement, McDowell-Purcell was obligated to drill the holes for the caissons down to sound rock, install a protective casing for each caisson that was seated in rock and sealed to prevent water seepage, and emplace the caisson when the EXCAVATION SITE was clean and free of water" (emphasis added).

The statement must have been composed by combining in part the following two sentences of the contract covering the work which McDowell was to perform:

"Each caisson shall have protective casing, the bottom of which shall be seated in rock and sealed to prevent seepage of water and then thoroughly cleaned."

. . . . . .

> "Prior to placing concrete for caissons, THE CAISSON EXCAVATION shall be clean and free of any foreign matter and water" (emphasis added).

The error made by the Court was indicated by the emphasis in the above quoted sentences. The error is critical since it goes to the heart of the basic and primary issue in this litigation, i.e., whose obligation was it, to seal the caissons and to prevent water seepage in the caisson excavation? The caisson excavation is entirely different from the excavation site. The excavation site was an area 220 by 290 feet, and was under water when the work commenced, and was 18 to 20 feet below the surface of the Warrior River (adjacent to the site). The use of the words "excavation site" rather than "caisson excavation" leads one to conclude that the Fifth Circuit never grasped the basic issue.

All of the witnesses, including McDowell's own witnesses, testified in the trial court that the source of the water getting into the caisson excavation was coming from the ground at the bottom of the caissons. It is also true that all of the witnesses, including McDowell's, stated that McDowell was required to seal the caissons to prevent the seepage of water. This is exactly what the subcontract required McDowell to do, and is the so-called "extra work" for which McDowell sought compensation.

In addition to these clear and unambiguous contract provisions and the testimony of these witnesses, McDowell itself recognized and acknowledged its obligation to remove the water from the caissons. For example, McDowell, in computing its bid, included $20,592.00 ($104.00 per day for 198 days) for pumps to pump water from the caissons excavated.

If that was not sufficient evidence of how McDowell interpreted the contract, it was also undisputed fact that it included in its bid price the costs of "pumping of caissons" and excluded "dewatering of basement area, excavation or shoring of basement walls."

The Fifth Circuit's Opinion of June 18, 1975 stated that "some negotiations took place" but this does not support the said court's conclusion that "the parties modified the contract requirements". These descriptive words "some negotiations took place" used by the Fifth Circuit accurately describe only the conversations that took place between Manhattan and McDowell when water was encountered in the caisson excavation. These "negotiations" were held after the first eighty (80) caissons had been sealed to prevent seepage of water and, therefore, arguendo, could have pertained only to the last 108 caissons.

The testimony at trial clearly showed a lack of mutual assent that Manhattan would pay for any so-called "extra work", which by definition would be a modification of the contract requirements. The Fifth Circuit's Opinion of June 18, 1975 was contradictory and self-defeating, since it had the effect of holding that, in spite of the unambiguous contract language to the contrary, removing water from the caisson excavations and sealing the caissons to prevent seepage of water was not in contemplation of the parties.

McDowell totally failed to meet its burden when one considers: the plain and unambiguous wording of the contract; the evidence on the source of the water; the evidence on how McDowell stopped the water, i.e. by sealing; and McDowell's own construction of the terms of the contract, i.e. its bid esti-

mate included $20,592.00 for "pumps", and its bid price included "pumping of caissons" and excluded "dewatering of basement area...."

VI

BASIS FOR FEDERAL JURISDICTION
IN COURT OF FIRST INSTANCE

Jurisdiction of this case in the United States District Court for the Northern District of Alabama was founded on diversity of citizenship and amount. Respondent is a corporation incorporated under the laws of, and with a principle place of business in, the State of Tennessee. Petitioner is a corporation incorporated under the laws of, and with a principle place of business in, Oklahoma. The situs of the controversy is in Gorgas, Alabama. The amount in controversy exceeds $10,000.00, exclusive of interest and costs.

VII

ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI

The foremost issue presented herein is whether or not the Fifth Circuit met and satisfied those standards required of an appellate decision and disposition. It is Petitioner's pronounced position that the Fifth Circuit did not meet such required standards and so far departed from the accepted and usual opinion and operation as to invoke the jurisdiction of The Supreme Court of the United States.

Petitioner, Manhattan, advanced six (6) separate propositions of error for consideration by the Fifth Circuit. These propositions were:

Proposition I: The Trial Court erred in considering the contractual obligations of Manhattan with Alabama Power Company as well as other extrinsic matters to the subcontract in determining liability of Manhattan.

Proposition II: The Court failed to give effect to the terms of the subcontract.

Proposition III: McDowell failed to sustain its Burden of Proof in establishing that the work it performed was an extra, i.e., not within the terms and provisions of the subcontract.

Proposition IV: McDowell failed to sustain its Burden of Proof that (1) Manhattan agreed expressly or impliedly to pay for any part or all of such alleged extra or (2) that there were sufficient circumstances upon which it relied to its detriment to give rise to an implied promise that Manhattan would pay for any part or all of such extra.

Proposition V: McDowell failed to establish damages with the degree of certainty required by law.

Proposition VI: The Trial Court abused its discretion in denying Manhattan the right to call, in rebuttal, an expert witness.

The Fifth Circuit, through processing under its Local Rules, made the determination that this appeal was so meritorious as to not be dismissed as frivolous under Local Rule 20, and likewise to not be assigned to the summary calendar under Local Rule 18 for cases not meriting oral argument. This cause,

therefore, progressed through briefing, deferral of the appendix, and oral argument, etc. until the Fifth Circuit rendered its opinion and judgment on June 18, 1975.

Said opinion affirming the trial court's judgment was very summary in content and form and was devoid of any citation of precedential authority. Said opinion (see p. A1 et seq., infra.) contained a brief restatement of facts and recounted the district court's computation of the monetary judgment. Said opinion then attempted to recognize Manhattan's six (6) propositions of error set out above and in Manhattan's two (2) briefs to the Fifth Circuit. However, the opinion only was able to recognize three (3) propositions and these were treated in an abbreviated fashion. Then, without anything more, the opinion concluded:

> "We have reviewed the record and carefully considered the contentions of the parties as urged in their briefs and at oral argument. It is our conclusion that Manhattan has not shown that the district court erred in its rulings, and that the evidence amply supports the judgment. Affirmed."

The Fifth Circuit neither in its summary opinion nor at any time ever made the determination that the judgment of the district court was based on finding of facts which were not clearly erroneous, or that no error of law appeared, or that its opinion herein would have no precedential value, all so that the judgment of the district court could be affirmed in such a summary fashion under its Local Rule 21. The Fifth Circuit thereby departed to such a great degree from the usual, accepted and proper course of circuit court of appeals conduct (not to mention the departure from its own local rules) as to require this Honorable Court's supervision and correction.

Such summary treatment by a circuit court of appeal is contrary to our fundamental and constitutional concept of due process, Constitution of the United States, 14th Amendment, and is furthermore, repugnant to the very act creating, and the philosophy behind, the said circuit courts of appeal, wherein the right to have one's appeal presented and appropriately processed is preserved.

Recently, the Fifth Circuit has carved out very finely defined and limited exceptions to the due process guarantees as a necessary evil in an effort to meet ever increasing case loads. The Fifth Circuit has claimed to recognize "the need for exercising judicial inventiveness to increase productivity and expedite disposition without sacrificing the quality demanded both by statute and fundamental concepts of due process." Murphy v. Houma Well Service, 409 F.2d 804 (5th Circuit, 1969). See, e.g., Peters v. Rutledge, 397 F.2d 731 (5th Circuit, 1968); Jackson v. Choate, 404 F.2d 910 (5th Circuit, 1968).

Murphy outlined the four classifications the Fifth Circuit judges have established. The first covers cases so lacking in merit as to be frivolous and subject to dismissal or affirmance without more. The second covers cases in which oral argument is not required and which go on the Summary Calendar for disposition on briefs and record without oral argument. Murphy was deemed to fall into this second class as the case was determined to be limited to the sole issue of which person was a statutory claimant of death benefits and, accordingly the case was placed on the Summary Calendar without oral argument. These two classes comprise the "judicial inventiveness" wherein due process safeguards have been side-stepped.

The latter two classifications of the Fifth Circuit as de-

tailed and explained in Murphy are made up of those cases deemed so meritorious as to demand oral argument and, presumably, full judicial attention and treatment. Class three cases allow limited oral argument, while class four cases are allowed the maximum time alloted oral argument. The case at bar was designated a class three cause and a limited oral argument was allowed. Despite this designation, the litigants were treated to a class one or class two summary disposition via an opinion (ordered not to be published) which didn't meet the issues raised, give the basis of its holdings, nor give citations of precedent.

Groendyke Transport, Inc. v. Davis, 406 F.2d 1158 (5th Circuit, 1969), is another example of a class two case where strict due process was not permitted. Once again, early on therein the case was identified as a class two case and determined not to warrant or require "usual process". In the case at bar no identification nor determination was ever made. Groendyke saw the Fifth Circuit promulgate two criteria under which summary disposition was deemed necessary and proper despite due process guarantees. One criterium was cases where time truly is of the essence. The second criterium was cases where the position of one of the parties is clearly right as a matter of law so that there could be no substantial question as to the outcome of the case or where the appeal is frivolous. In Groendyke, the Fifth Circuit found both criteria, disallowed oral argument, but nonetheless, rendered a scholarly and detailed opinion and judgment. In the instant cause, the Fifth Circuit found neither criteria, allowed oral argument, but rendered a most improper summary opinion and judgment.

Huth v. Southern Pacific Company, 417 F.2d 526 (5th Circuit, 1969) is still another effort by the Fifth Circuit judges

to dispose of an appeal in a summary fashion while attempting to fend off opposition to same through an exhaustive discussion of the safeguards in the process of judicial screening of cases before calendaring into the four classes. Huth makes it even more crystal clear that once a case is placed on the class three plateau, it must have more from the court than a summary disposition. One is appalled at the nakedness of the opinion in the instant cause in comparison to those of Murphy, Groendyke and Huth, supra.

The error in the Fifth Circuit's opinion herein is most apparent from a consideration of the decision, and standards promulgated therein, by Chief Judge Brown (a member of the very panel rendering the stark opinion of June 18, 1975 herein) in N.L.R.B. v. Amalgamated Cloth. Wkrs. of Amer., AFL-CIO, L. 990, 430 F.2d 966 (5th Circuit, 1970). Amalgamated was determined by the court to be a "run-of-the-mill N.L.R.B. Order finding that a union had violated the Act by threatening employees with loss of employment." Therefore, such determination led the court to a Local Rule 21 summary disposition without an opinion. To do so, the court was compelled by Local Rule 21 to find one or more of the following circumstances to exist and to be dispositive of the matter submitted to the appeals' court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the Court also determines that an opinion would have no precedential value.

The Fifth Circuit herein did not find any of the above circumstances to exist and be dispositive. Therefore, it was bound

to a scholarly and complete opinion by its own promulgated standards:

> "We must determine in each case whether the outcome under review meets acceptable legal standards. But our role does not stop there even though to the parties it is the result we ordain which counts the most.
>
> A most important function is the writing of opinions. Opinions are to serve a number of purposes at least two of which are highly significant. One is that an articulated discussion of the factors, legal, factual or both, which lead the Court to one rather than to another result, gives strength to the system, and reduces, if not eliminates, the easy temptation or tendency to illconsidered or even abritrary action by those having the awesome power of almost final review. The second, of course, is that the very discursive statement of these articulated reasons is the thing out of which law - and particularly Judge-made law - grows. It is an essential part of the process of the creation of principles on which predictions can fairly be forecast as a basis for conduct, accountability, or the like. All Judges know that in some cases this latter factor may almost completely transcend the importance of the case which is the vehicle bringing the questions forward.
>
> By Rule 21 the Court not only implicitly assumes the responsibility for evaluating this factor, but also is specifically commanded to make the conjunctive judicial determination that an opinion would have no precedential value. Having to make unanimously that explicit decisive determination,

and implicitly, the further one that circumstances or factors, other than precedential value, do not make an opinion essential or appropriate, the Court, by the adoption of the Rule, affirms that it must be carefully and selectively employed.

The Court recognizes that it must - the word is must - never apply the Rule to avoid making a difficult or troublesome decision or to conceal divisive or disturbing issues. This means that while Rule 21 should make a real contribution toward the goal of avoiding delays which can often amount to a denial of justice, it must be sparingly used.

The Court itself must be vigilant. We believe we are sensitive now to the factors which would make application of the Rule wrong or unwise or inappropriate. It is the Court's purpose to heed them and in our own survival assure survival of the system we cherish." (at pp. 972-3).

Despite these standards set by the Court, it is respectfully submitted that Manhattan was treated to a wrong, unwise and inappropriate application of the offspring of the Fifth Circuits Local Rules on summary disposition in a cause where the court did not find the finding of facts of the trial court to not be clearly erroneous, did not find no error of law present, and did not determine the cause to be of no precedential value.

The opinion rendered herein did not contain "articulated discussion of the factors, legal, factual or both" upon which "predictions can fairly be forecast as a basis for conduct, accountability, or the like". The central questions which the Court was required to answer were:

(1) Was the work performed by McDowell covered by Section III of the contract, or was it

part of Section II?

(2) What part or parts of the contract did the Court of Appeals consider in answering this question?

(3) If the work was not covered by the contract, can there be an oral agreement for "extra work" when the contract required "extras" to be in writing?

(4) If the answer to question (3) is yes, then what facts did the Court of Appeals consider in concluding there was an oral agreement?

An articulated opinion discussing the facts which the Court of Appeals considered in answering these questions, followed by controlling legal authorities, was demanded in this case.

By its opinion, the Fifth Circuit so far departed from acceptable and proper judicial conduct that the Supreme Court of The United States must supervise same by granting a review upon writ of certiorari.

A second and most important issue presented herein is whether or not the Fifth Circuit's opinion may be upheld without review by this Honorable Court since said opinion, despite its nakedness, must stand as an endorsement of the propositions that a contractor may recover the "extras" despite the lack of a written agreement therefore. Said proposition and opinion in this particular is in total and indistinguishable conflict with other precedent propounded by the Fifth Circuit and with controlling Alabama law.

This opinion cannot be s
precedent from the Fifth Circ squared with the latest reported
extra work by a contractor. cuit on this issue of recovery for
nental Engineering, Ltd., 407 Chemical Const. Corp. v. Conti-
affirmed the judgment of th 7 F.2d 989 (5th Circuit, 1969)
Northern District of Alabama he U.S. District Court for the
McDowell was denied recover a wherein a subcontractor like
was never substantiated by wr ry for extra work because same
written change order.

The circumstances of Ch
those in the case at bar. Conti hemical are soberingly similar to
nental), a subcontractor on t tinental Engineering, Ltd. (Conti-
handling and storage facility, su the construction of a fertilizer
(Chemical) as the job's general sued Chemical Construction Corp.
equitable fee adjustment. C ral contractor for a $540,000.00
equitable fee adjustment by res Continental did not seek this
ly provided for an equitable fee esort to the contract, which clear-
written change orders whereby fee adjustment only on the basis of
material increase in the scope o by Chemical would acknowledge a
written change orders had been e of the work. The court found no
quested by Continental were d en made. Those change orders re-
cuse that Chemical was unable t denied by Chemical with the ex-
owner. le to secure similar relief from the

Consequently, Continental
ten contract being ambiguous ital based its argument on the writ-
being admissible to explain it an us and, therefore, parol evidence
scope. Continental asserted that t and to further define the project
parties established the project's s that an oral agreement between the
tract between the parties. This t's scope and not the written con-
lishing project scope was averred This alleged oral agreement estab-
equitable fee adjustment. rred to be the basis for the claimed

The trial judge was not persuaded by Continental's argument and neither was the Fifth Circuit. A directed verdict for Chemical was affirmed. The Court of Appeals found the written contract to be clear and unambiguous. The Court of Appeals advice to Continental would be equally apropos to McDowell with regard to how to avoid the oral mutual assent or implied promise pitfall and that advice was that the subcontractor "should have stopped right there and said we won't go one foot further until you give us a written change order." To the same effect is the case of U.S., for Use and Benefit of Lichter v. Henke Const. Co., 157 F.2d 13 (8th Circuit, 1946).

The Fifth Circuit summed up its opinion by reasoning that even though Continental may have injured itself economically when it capitulated on its demand that a fee adjustment be made, "we cannot now create for the subcontractor by construction of the contract, a more beneficial compensation scheme than it was able to secure in an arm's-length, even if no-holds-barred, negotiation." Citing National Surety Corp. v. Western Fire & Indemnity Co., 318 F.2d 379, 387 (5th Cir., 1963).

In Blair v. United States, 66 F.Supp. 405 (Ala., 1946), affirmed 164 F.2d 115, cert. denied 68 S.Ct. 910, 33 U.S. 880, rehearing denied 68 S.Ct. 1336, 334 U.S. 830, Blair had entered into a written contract with the United States National Housing Agency and the Federal Public Housing Authority wherein it was agreed that Blair would dismantle certain prefabricated buildings at Granada, Mississippi, and then transport them to Key West, Florida, and there reassemble them according to the plans and specification attached to the said contract. The specifications to the contract placed all responsibility for all build-

ings, fixtures, equipment, etc., including loss, breakage, or "other damage" thereto from date of notice to proceed until completion and acceptance of the project, upon Blair. The contract also provided that no charge for extra work would be allowed unless the same be ordered in writing and the price stated in such order.

Everything was proceeding nicely under the contract when a hurricane struck Key West, Florida, and caused considerable damage to certain of these buildings which were being erected by Blair for the defendants. Immediately after the hurricane the Court found that the Regional Director of the defendant Housing Agencies telephoned Blair and told him to go ahead to protect the work and to repair the damage and further told Blair that the question of whether it was plaintiff's loss or defendant's loss would be decided later. Blair thereupon repaired the damage to the buildings caused by the hurricane.

After completion of the repairs, Blair requested of defendant payment for this work as "extra work" outside of that required by him by contract. The Court defined "extra work" as used in connection with a building and construction contract to mean "work of a character not contemplated by the parties and not controlled by the contract", citing 17 C.J.S., Contracts, §371, page 851, note 85. As to what constitutes extra work for which a contractor is entitled to additional compensation, the Court held that this depends on the construction of the particular contract. The Court was of the opinion here that said repair work was not contemplated by the parties at the time the contract was executed and that the above recited section of the specifications placing all responsibility for loss, breakage or "other damage" upon Blair would not cover this repair work, so that the Court found the repairs to be "extra work".

However, despite these repairs being judicially determined to be "extra work" judgment for the defendants was affirmed and it was held that no recovery for this "extra work" could be had because there was a total failure to comply with the contract provisions requiring written approval of such "extra work". The oral request or verbal direction of the Regional Director was not binding and the Court found no agreement to pay additional compensation to have been made. A properly executed written contract between the parties was held absolutely essential for extra work to be rewardable. The Court stated that "it is not for the courts to revise the written contract of the parties," citing Yuhasz v. United States, 109 F.2d 467 (7th Cir., 1940). Since written approval of the extra work was never given, upon these facts, the Court denied Blair recovery either under the contract or on quantum merit.

In the face of Blair and Chemical, supra, the opinion herein is contradictory and cannot stand. Perhaps, the holding on recovery for extras without a written agreement resulted unwittingly through the summary treatment herein discussed and the Court's failure to meet this and each issue presented on appeal head-on. In any event, such direct conflict within the circuit, between the circuits, and to applicable state law makes this cause particularly ripe for review by this Honorable Court on writ of certiorari.

CONCLUSIONS

Pursuant to the Rules of Supreme Court of The United States, Rule 19, this Honorable Court, within its sound judicial discretion, should grant a review of this cause on writ of certiorari for the special and important reason that the United States Court Of Appeals For The Fifth Circuit, by its summary opinion and disposition in affirmance herein, so far departed from the accepted and usual course of judicial proceedings as to demand an exercise of this Honorable Court's power of supervision. This Honorable Court should likewise grant review for the further special and important reason that the said Fifth Circuit's decision herein is in direct conflict with the decisions of the Fifth Circuit and other circuit courts of appeals, as well as with applicable Alabama law, on the issue of recovery for "extras" without a written agreement therefore.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Richard A. Wagner, II
Thornton, Wagner & Thornton
1111 Mid-Continent Building
Tulsa, Oklahoma 74103

Attorneys for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 74-2363

McDOWELL-PURCELL, INC.,

Plaintiff-Appelle,

v.

MANHATTAN CONSTRUCTION COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Alabama

(June 18, 1975)

Before BROWN, Chief Judge, and GEWIN and THORNBERRY, Circuit Judges. PER CURIAM:

Appelle McDowell-Purcell, Inc., the subcontractor on an Alabama Power Company construction project, filed a claim for work and labor performed against appellant Manhattan Construction Company, the project's general contractor. McDowell-Purcell's contract with Manhattan called for it to perform the caisson work at the Gorgas Steam Plant -- Unit No. 10 site. Under the agreement, McDowell-Purcell was obligated to drill the holes for the caissons down to sound rock, install a

protective casing for each caisson that was seated in rock and sealed to prevent water seepage, and emplace the caisson when the excavation site was clean and free of water. Excess water at the excavation site caused serious problems for McDowell-Purcell in fulfilling its contractual obligations. After the first eighty caissons had been placed, some negotiations took place, and the parties modified the construction requirements. McDowell-Purcell then completed the construction of the remaining caissons, and filed this action to recover expenses incurred in performing work it claimed was in excess of its contractual obligations.

The district court entered judgment in favor of McDowell-Purcell, allowing a recovery totalling $80,581.89, computed as follows:

(1) Extra labor and material expended in connection with construction of first 80 caissons (with 6% interest from Nov. 20, 1969 to March 20, 1974)..... $50,400.00

(2) Labor and material expended for work beyond subcontract obligations on remaining caissons (with 6% interest from May 4, 1970 to March 20, 1974)... $26,245.13

(3) 15% profit on extra work on remaining caissons (with 6% interest from May 4, 1970 to March 20, 1974)..... $ 3,936.76

$80,581.89

Manhattan challenges the district court judgment here. It claims that the district court erred (1) in determining the contractual obligations of the parties, (2) in imposing on Manhattan the obligation to pay for the extra work performed, and (3) in

holding that McDowell-Purcell had established its damages with a sufficient degree of certainty.

We have reviewed the record and carefully considered the contentions of the parties as urged in their briefs and at oral argument. It is our conclusion that Manhattan has not shown that the district court erred in its rulings, and that the evidence amply supports the judgment.

AFFIRMED.

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

October Term, 1974

No. 74-2363

D. C. Docket No. CA 72 G 823 J

McDOWELL-PURCELL, INC.,

Plaintiff-Appellee,

versus

MANHATTAN CONSTRUCTION COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Alabama

Before BROWN, Chief Judge, and GEWIN and THORNBERRY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

June 18, 1975

UNITED STATES COURT OF APPEALS

Edward W. Wadsworth
Clerk

Fifth Circuit

Office of the Clerk

600 Camp Street
New Orleans, LA 70130
Telephone 504-589-6514

September 25, 1975

TO ALL COUNSEL OF RECORD

No. 74-2363 - McDowell-Purcell, Inc. vs. Manhattan Construction Company

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

by/s/ Barbara Krei
Deputy Clerk

cc: Mr. James Clark
Messrs. David M. Thornton
Gerald G. Stamper

APPENDIX B

X B

B1

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
JASPER DIVISION

McDOWELL-PURCELL, INC., A Corporation,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 72-G-823-J
MANHATTAN CONSTRUCTION COMPANY, A Corporation,	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause coming on for trial and the court having heard the evidence of the witnesses ore tenus and considered the exhibits introduced herein, the court enters the following findings of fact and conclusions of law:

(1) On to-wit the 9th day of May, 1969, the parties hereto entered into the subcontract agreement identified during the trial of this cause as Plaintiff's Exhibit 1, by virtue of which the plaintiff, McDowell-Purcell, Inc., (sometimes herein-after referred to as "McDowell" and also as "subcontractor") stipulated as follows:

teel
ling

"To furnish all materials (except reinforcing s the materials) labor, equipment and supplies inclu lso all applicable taxes and insurance required for all concrete caissons at the following unit prices; re- the furnishing and setting of a 24" pipe casin ma in accordance with Plans and Specifications or- pared by Southern Services, Inc. for the Alab AP. Power Company, Substructure Construction, gas Steam Plant - Unit No. 10, Inquiry No. 7923 - "

icture con-

The plans and specifications relating to substr oned were struction at Gorgas Steam Plant hereinbefore men ncludes in identified as Plaintiff's Exhibit 2, and the court c considera- determining the rights of the parties herein that du obligation tion and substantial significance must be given to th y (herein- of the defendant, Manhattan Construction Compa as "prime after sometimes referred to as "Manhattan" and als under, in- contractor") to the Alabama Power Company ther herefrom: cluding but not limited to the following excerpts

A." SECTION I

GENERAL

SCOPE

fol-

These specifications are intended to cover the on- lowing items of work in connection with the t - struction of the Purchaser's Gorgas Steam Pla all Unit No. 10. The Contractor shall perform all operations of work required and shall furnish all supervision, labor, equipment, tools, plant, an all materials (******) required to satisfactorily om- plete the specified work.

* * * * * * * * * * * * * * * * * * *"

Removal of ground water and surface water as required to keep the excavations sufficiently dry to allow construction to progress as scheduled.

* * * * * * * * * * * * * * * * * * *"

B." SECTION II

EARTHWORK, ROCK WORK AND UNWATERING

SCOPE

The Contractor shall perform the items of work specified below:

* *

Removal of surface and ground water, and keeping working areas sufficiently dry to allow construction to progress as scheduled.

* *

UNWATERING OF GROUND WATER

In order to perform the excavation for the powerhouse, the water passages, intake-discharge structure and chimney foundation, the removal of ground water will be required. * * * * * * * *"

The unwatering system for removal of ground

water will have to be installed during excavation operation.

* *

SURFACE DRAINAGE

The Contractor shall be responsible for surface drainage water in the areas in which he is working, and all pumping required shall be done by the Contractor at the Contractor's expense. Cuts and fills shall be made in such a manner as to avoid pockets and to allow water to run off without ponding. All temporary drainage facilities for surface water shall be furnished by the Contractor at the Contractor's expense. *.

* *

UNWATERING OF GROUND WATER

Each Bidder shall quote a total price for furnishing all equipment and performing all operations of work required for pumping out the existing pond after the earth dike is placed and for installing, maintaining, operating and removing the unwatering system. * * * * * * * * * * * * * * * * * * *"

(See Plaintiff's Exhibit 2, Pages 2-1, 2-4, 2-5 and 2-9.)

In respect to the last quoted requirement, the specifications further show that Manhattan quoted the lump sum price of $26,609.00 "For pumping out pond and unwatering as specified." Plaintiff's Exhibit 2 further shows that the prime contractor quoted unit prices for caissons and other pipe cas-

ings approximately twenty per cent (20%) in excess of the prices for said work which it obtained from the plaintiff. (See Page 3 of the specifications.) In other words, defendant contracted with the owner for a profit of twenty per cent (20%) on the work which it had subcontracted to McDowell. According to the evidence, Manhattan was paid by the Alabama Power Company, with whom it had contracted for "unwatering" and the caisson work which was performed by McDowell. In further connection with its "unwatering" obligation, it is shown on page 14 of the specifications that the defendant proposed to subcontract this phase of the work to John W. Stang Corp. of St. Petersburg, Florida, but under the evidence the same was not performed by Stang, being undertaken by Manhattan itself.

C."

SECTION III

ROCK SUPPORTED FOUNDATIONS FOR POWERHOUSE

SCOPE

This section of the Specifications is intended to cover the furnishing of all materials, equipment, labor and supervision required for drilled piers (concrete caissons) and fill concrete as required to support the Unit No. 10 powerhouse building for Gorgas Steam Plant; * * * * * * * * * * * * * * * .

CAISSONS

* *

Foundations under the powerhouse shall be drilled piers (concrete filled caissons) down to sound rock to permit inspection of the bearing surface. These

shall be of various sizes from 3' to 10' in diameter as indicated in the proposal form and as will be shown on the Purchaser's approved drawings. It is estimated that approximately 300 caissons will be required. * .

* * * * * * * * * * . Each caisson shall have a protective casing, the bottom of which shall be seated in rock and sealed to prevent seepage of water and then thoroughly cleaned.

* *

Prior to placing concrete for caissons, the caisson excavation shall be clean and free of any foreign matter and water. No concrete shall be placed for caissons until after each is approved by the Purchaser's Superintendent. "

(See Plaintiff's Exhibit 2, Pages 3-1 and 3-2.)

In reaching its decision here, the court concludes and so finds that in the performance of its own obligations under the plans and specifications relating to "Rock Supported Foundations for Power House" as above quoted and as a condition precedent thereto, McDowell was entitled to rely upon, and did in fact, to its detriment, depend upon the fulfillment by the defendant prime contractor of its responsibilities as contracted for with the Alabama Power Company and as more particularly stated in paragraphs A. and B. hereinbefore set out. The court further finds in this regard, and attaches some significance thereto, that Manhattan not only agreed to complete the "unwatering" of the work site as specified for the unit price of $26,209.00 but did in fact secure the approval by Alabama

Power Company of John W. Stang Corp. as its "unwatering Subcontractor" although it did not employ its services in this connection.

(2) The court concludes and further finds that the obligations of Manhattan, as spelled out in Plaintiff's Exhibit 2, and the responsibilities of the plaintiff and defendant, each to the other, as described in their subcontract agreement, Plaintiff's Exhibit 1, are not ambiguous; however, as regards the latter, in the event of any uncertainty therein, the intendments of said subcontract are to be construed favorably in behalf of McDowell because Manhattan was the scrivener thereof and had the opportunity of making more specifically known to the plaintiff the terms of their agreement in respect to any doubtful stipulations contained therein.

(3) The court finds that although, after a fashion and for which it was compensated, Manhattan undertook the "unwatering" of the work site, including the locus of excavations where caissons were to be placed on the premises of construction, it did not do so sufficiently to prevent the plaintiff from being required to perform its work on many caissons at places where the project was not "unwatered" as it had the right to expect. In this connection, the court further finds that in complying with the demands forced upon it by Manhattan via representatives of the Alabama Power Company and vice versa, the plaintiff was made to incur additional expense and to suffer extra costs and delay in the performance of its work which had not been contemplated by the parties and to which it had not agreed. In this regard, the court finds that said demands were in many instances, and particularly as related to the handling of water in caisson holes, unreasonable, arbitrary, and

sometimes capricious; and, further, that in its compliance with the directions and demands made upon it as concerns the "unwatering" of its work, plaintiff in large measure discharged an obligation of Manhattan to Alabama Power Company for which McDowell-Purcell was not responsible under its subcontract with the defendant.

(4) In the foregoing connection, the court finds that very soon after the plaintiff engaged upon its subcontract for the construction of caissons, conditions were encountered at the work site whereby large and unusual quantities of water had to be contended with by McDowell, resulting in increased cost and delay in the performance of its work. The court finds that this condition consisted in the main of ground water which came from within the ground itself or from rock strata beneath the overburden of earth which covered said rock and which was the obligation of Manhattan to excavate and "unwater". In some degree, plaintiff was also required to handle surface water which was the primary responsibility of the defendant, Manhattan, and also at increased expense and delay. During the course of attempting to construct caissons under the rigid and oftentimes unreasonable requirements imposed upon it by Manhattan at the insistence of Alabama Power Company, McDowell was compelled to fully seal and water-plug numerous caissons and to a degree beyond that contemplated by its subcontract with Manhattan, and was also delayed in the pouring of concrete in caisson holes until it had made the same completely dry and to an unnecessary degree. The court finds that the plaintiff protested its being required to perform its work and to unwater and seal the caisson holes as aforementioned, but proceeded to do so with a full reservation of its rights to claim additional compensation therefor; in which connection see Plaintiff's Exhibit 31 confirming in writing the position

taken by McDowell via a letter written by its counsel of record herein to the defendant, which under the evidence is acknowledged to have been received.

(5) The court further finds that on or about November 18, 1969, the plaintiff, through its president, Bruce Purcell, threatened to remove its equipment and personnel from the project if required to continue to complete sealing and water-plugging of caisson holes as previously exacted of said subcontractor over its protest as hereinbefore mentioned. The court finds that on this occasion it was stipulated between the parties that in the placing of subsequent caissons, the plaintiff would be required to only partially water-plug those where water was encountered at the bottom of the hole and would not be compelled to completely seal the same as it had previously. In this connection, McDowell was directed to keep records relating to its expense in water-plugging and unwatering caisson holes under these terms, which it did, with its costs being acknowledged by the written signature of the defendant's superintendent on the job who was instructed by Manhattan to check the same. The court is of the opinion that the circumstances under which McDowell was directed to proceed in late November with partially sealing caissons by the water-plugging method were such that it was entitled to expect reasonable compensation therefor, and it is of consequence that the defendant's project manager, Mr. Roberts, conceded during the course of his testimony that he did not advise the plaintiff that reimbursement was contingent upon Manhattan's obtaining additional compensation from Alabama Power Company until after McDowell-Purcell had already accomplished the remainder of its work.

In view of the foregoing, the court concludes and so finds that the plaintiff is entitled to have and recover of the defendant the sum of Twenty-one Thousand, Two Hundred Ninety-one Dollars and Forty-four Cents ($21,291.44) as represented by Plaintiff's Exhibits 40, 41, 42, and 43, and for the furnishing of labor and material as referred to therein on the basis of the charges therefor being reasonable, the work being authorized, and the same being performed in the discharge of an obligation of the defendant for which the plaintiff had not subcontracted. The court also concludes and so finds that McDowell-Purcell is entitled to a reasonable profit on said work equivalent to fifteen per cent (15%) of the value thereof, which amounts to Three Thousand One Hundred Ninety-three Dollars and Seventy-two Cents ($3,193.72). The court also finds the plaintiff due to be paid interest on the charges represented by the aforementioned invoices which are summarized on Plaintiff's Exhibit 39 and upon the fifteen per cent (15%) profit due it thereon from May 4, 1970, which is the date of McDowell-Purcell's last invoice to Manhattan relating to this part of its claim.

(6) While the court concludes and finds that the plaintiff is also entitled to reasonable compensation for the increased costs and delay to which it was subjected in completing the first eighty (80) caissons constructed by it under its subcontract agreement with the defendant and prior to November 19, 1969, the problem of arriving at its damages in this regard is more difficult in that no precise accounting was attempted, breaking down the subcontractor's increased costs and expense in this connection.

Mr. Bob Long, plaintiff's project manager, and a witness of many years' experience in caisson construction, whose testi-

mony was accepted by the court as that of an expert in his field, has testified that in his judgment and without regard to the formulas for arriving at McDowell's increased cost for the first eighty (80) caissons as are reflected in Plaintiff's Exhibits 45-47a, that Forty-six Thousand, Eight Hundred Eighty-six Dollars and Forty Cents ($46,886.40) would be reasonable compensation therefor. Bruce Purcell, plaintiff's president and also an expert in the field of caisson construction of many years' experience, has testified that without resort to the averaging of cost of caisson formulas employed in said exhibits, a reasonable increase in cost of placing the first eighty (80) caissons by McDowell-Purcell, Inc., under the conditions which obtained would run from Five Hundred Dollars ($500.00) per caisson to Five Hundred Eighty-six Dollars and Eight Cents ($586.08). The opinion testimony and judgment of these plaintiff's witnesses was not substantially contradicted and the court was impressed by their demeanor on the stand, their experience, and their ability and opportunity to arrive at the judgments of increased costs for the first eighty (80) caissons as sworn to by them. The court, therefore, concludes and finds that the plaintiff is entitled to have and recover of the defendant the sum of Forty Thousand Dollars ($40,000.00) as additional compensation due it for its increased cost of the construction of the first eighty (80) caissons on the project and with interest thereon from November 20, 1969.

Done this 20th day of March, 1974.

/s/ J. Foy Guin, Jr.

UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
JASPER DIVISION

McDOWELL-PURCELL, INC., A Corporation,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 72-G-823-J
MANHATTAN CONSTRUCTION COMPANY, A Corporation,	)	
Defendant.	)	

JUDGMENT

In conformity with the Findings of Fact and Conclusions of Law filed this date in the above-styled action, it is hereby ORDERED, ADJUDGED and DECREED that judgment be entered in favor of the plaintiff, McDowell-Purcell, Inc., and against the defendant, Manhattan Construction Company, in the following amounts:

$21,291.44	with interest at 6% from May 4, 1970, to March 20, 1974, which equals -	$26,245.13
$ 3,193.71	with interest at 6% from May 4, 1970, to March 20, 1974, which equals -	3,936.76
$ 3,193.72		

$40,000.00	with interest at 6% from November 20, 1969, to March 20, 1974, which equals -	50,400.00
	making a total of:	$80,581.89

against the defendant, Manhattan Construction Company.

The costs of this proceeding are taxed

Done this 20th day of March, 197

in, Jr.

/s/ J. Foy G

ATES DISTRICT JUDGE

OY GUIN, JR.

UNITED ST

J.